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September 15, 2014 Received & Inspected

SEP 22 2014
FCC Mail Room

1020

The Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioners:

To remain competitive in a tough 21st century global economy, America is going to need a best-in-class and always-improving broadband platform, which will drive innovation and growth. High-speed broadband must be equally accessible by all American consumers and all edge service providers. But lack of real competitive choice among broadband access providers means that a few Internet Service Providers (ISPs) have unrestrained last-mile power that allows them to pursue profit schemes such as paid prioritization without having to account for the adverse impact on the overall Internet ecosystem.

Where the marketplace does not offer the public an option to exercise its choice for an open Internet, policymakers have a responsibility to act on behalf of the public interest.

So I welcome Chairman Wheeler's recent call for U.S. policymakers "to do everything in our power to ensure that the United States has the world's most dynamic and competitive broadband ecosystem with a virtuous cycle of new investment, new innovations, and new services." ("The Facts and Future of Broadband Competition", Sept. 4, 2014.) Fortunately, the Federal Communications Commission ("FCC") has the authority under Title II of the Communications Act to safeguard America's broadband future by ensuring that paid prioritization and other practices do not thwart the entry of new edge service providers and dull market incentives for continuous infrastructure improvement.

I fully support efforts to protect, encourage and create competition, including in the context of merger reviews, Internet Protocol transition, spectrum allocation, citizen-driven broadband expansion and universal service, as well as the Open Internet proceeding. Where competition can work, it should be allowed to work. However, as the FCC has clearly documented and you have lamented, no such competition currently exists in the high-speed broadband access market. And there is no indication that sufficient competition will evolve in the near-term to disincentivize providers from exploiting their last-mile power in ways that undermine the vision you have set out for America's broadband future.

So I am urging you to follow the FCC's findings about today's broadband reality and tomorrow's broadband needs to their logical legal conclusion. In order to send a clear signal to the market that the FCC stands ready and well-grounded to intervene where broadband access providers adopt practices that threaten the public interest in a vibrant 21st century broadband

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ecosystem, it is necessary and imperative that you to reclassify broadband access services under Title II of the Communications Act of 1934.

As Chairman Wheeler has said, it is time for the FCC to establish clear rules of the road in order to provide guidance to all players and restrain the sort of future actions that would harm the public interest and disincentivize investment and innovation. And -- since the Federal Circuit has made clear that Section 706 of the 1996 Telecommunications Act does not provide sufficient authority for the FCC to prohibit, or even adopt a meaningful presumption against, paid prioritization -- it is time for the FCC to set its rulemaking on the firm legal foundation of Title II of the 1934 Communications Act.

Moreover, I consider it misleading that the public conversation about Title II classification is being dogged by rhetoric of the dangers of over-regulation. Classifying broadband as a Title II service would not entangle the Internet in the sort of regulatory thicket that governed telecommunications service provision in the 1970s and 1980s. Indeed, Congress acted in the 1996 Telecommunications Act to ensure that the FCC has discretion to forbear from applying all but the few Title II provisions needed to do the job. And there is broad consensus that the FCC would only need to apply a handful of Title II provisions in order to preserve an open Internet.

I look forward to continuing to work with you to keep the Internet open as a platform for innovation, communication and commerce.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ron Wyden', is written over a horizontal line.

Ron Wyden
U.S. Senator



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

October 17, 2014

The Honorable Ron Wyden
United States Senate
223 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Wyden:

Thank you for your letter about the need for the Commission to restore rules to protect the Open Internet. I share your concerns. Since the D.C. Circuit's decision in January, there are no rules in place to prevent a broadband provider from engaging in conduct harmful to Internet openness, such as blocking a consumer from accessing a requested website or degrading the performance of an innovative Internet application. The Open Internet is too important to leave consumers and innovators unprotected. We must reinstate strong, enforceable Open Internet rules, and we must do so with dispatch.

As you know, in May, the Commission adopted a *Notice of Proposed Rulemaking* ("Notice") to begin that process. We asked a fundamental question: What is the right public policy to ensure that the Internet remains open? And we sought comment on the best way to achieve that fundamental policy goal. The response has been remarkable: Over 3.7 million comments were filed by the close of the comment period on September 15, 2014. This record-setting level of public engagement reflects the vital nature of Internet openness and the importance of our getting the answer right in this proceeding.

Your letter touches on key issues in the *Notice*, and it will be included in the record and considered as a part of the Commission's review. In particular, you call on the FCC to "send a clear signal to the market that the FCC stands ready and well-grounded to intervene where broadband access providers adopt practices that threaten the public interest in a vibrant 21st century broadband ecosystem." I wholeheartedly agree. The purpose of our Open Internet rules will be to protect and promote the Open Internet, including eliminating discrimination that harms consumers, competition, and free expression.

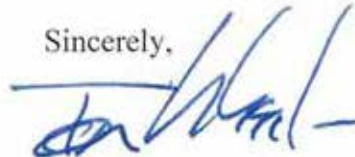
With respect to your thoughts about the legal foundation for our rules, the Commission is considering several options, including Section 706 and Title II of the Communications Act. The *Notice* specifically asks questions about these approaches, including whether the Commission should revisit its classification of broadband service as an information service or whether we should separately identify and classify under Title II a service that "broadband providers... furnish to edge providers." For approaches involving a Title II classification, we also ask about how our forbearance authority should be used to tailor Title II obligations to achieve our public policy goals. Since the *Notice*, record filings by some parties – such as AOL, Mozilla, the Center for Democracy and Technology, a coalition of library and higher education associations,

Rep. Henry Waxman, and others – have suggested additional approaches that would combine aspects of both our Section 706 and Title II authority. We are looking closely at these approaches as well. This reflects what I have said many times, most recently before the House Committee on Small Business: All options remain on the table, including Title II.

Our *Notice*, of course, is just the beginning. We held Open Internet Roundtable discussions last month, focused on the scope of our Open Internet rules and on whether and how they should apply to mobile broadband, including the application of reasonable network management to wireless technologies. I was also pleased to participate in Roundtable discussions about how to tailor our rules to achieve our policy goals, enforcement, technology, economic theory, and, most recently, legal authority. Through these events, we have heard views of experts on all sides of the issue, along with real-time input from the public. At the same time, a cross-Commission staff team is hard at work reviewing the many comments filed over the last four months. Our efforts will ensure that all views are taken into account as the Commission looks to adopt sustainable rules that achieve our shared Open Internet goals.

From the outset of this critically important undertaking, I have been and remain committed to exercising the Commission's authority, as needed, to ensure the Internet remains free and open for decades to come. I look forward to continued engagement with you as the proceeding moves forward to a successful conclusion.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", with a horizontal line drawn across the middle of the signature.

Tom Wheeler